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ORIGINAL

89-7272 (2)

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD HARMELIN,

Petitioner,

v

STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

RONALD HARMELIN
In Proper Persona
188131
Scott Regional Correctional Facility
Plymouth, Michigan 48170

Supreme Court, U.S.
FILED
APR 02 1990
JOSEPH F. SPANIOL, JR.
CLERK

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PROOF OF SERVICE

I, the undersigned, hereby certify under penalty of perjury that one copy of Petition for Certiorari, Motion to Proceed in Forma Pauperis, Affidavit in Support, and other supporting documents has been served on Frank J. Kelley, Attorney General, State of Michigan, 525 West Ottawa Street, 760 Law Building, Lansing, Michigan, 48913, and Oakland County Prosecutor, 1200 N. Telegraph Road, Pontiac, Michigan 48055, by mail.

Ronald Harmelin
Ronald Harmelin, Petitioner

Subscribed and sworn to before
me this 29th day of March, 1990.

Bethany K. Thomas
Notary Public Bethany K. Thomas
My commission expires: 8-4-93

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Ronald Harmelin, petitioner in pro per and in forma pauperis, respectfully prays that a Writ of Certiorari issue from this Honorable United States Supreme Court to review the decisions of the Michigan courts in this case on constitutional issues of major importance.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SEARCHES AND SEIZURES VIOLATED THE FOURTEENTH AMENDMENT AND THE TRIAL COURT ERRED BY FAILING TO SUPPRESS THEIR FRUITS.

II. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE RIGHT TO PLEAD NOT GUILTY WHERE DESPITE HIS PLEA OF NOT GUILTY, HIS ATTORNEY FAILED TO ARGUE THAT THE TRIAL RECORD PROVIDED A BASIS FOR FINDING THE DEFENDANT NOT GUILTY.

III. WHETHER THE MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

IV. WHETHER THE STATE COURT OF APPEALS' LACK OF JURISDICTION TO REVERSE THEMSELVES ON THEIR OWN MOTION VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

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STATEMENT OF THE CASE

Defendant-Petitioner Ronald Harmelin was convicted of possession of more than 650 grams of cocaine and possession of a firearm in the course of a felony, in a bench trial in the Oakland County Circuit Court, a state court of Michigan, before the Hon. Gene Schnelz. On April 30, 1987, Judge Schnelz imposed the mandatory sentences required by statute: life imprisonment without possibility of parole, with 2 years consecutive on the gun charge (ST-3,4).

On May 12, 1986, Oak Park Police stopped the car of Defendant Ronald Harmelin for going through a red light at a turn-around without stopping (EH-10). Ultimately, the police searched his person and the trunk of his car and found cocaine. An evidentiary hearing on a motion to suppress the fruits of the searches and seizures was held before the Hon. Robert C. Anderson on November 12, 1986 and January 12, 1987. Judge Anderson denied the motion on January 12, 1987 (EH2- 59,60).

The defendant made a timely appeal to the Court of Appeals. On January 9, 1989, the Court of Appeals, Judges Wahls, Hood, and N.J. Kaufman issued an unpublished opinion reversing the defendant's conviction ruling that a police officer, after stopping an automobile for a traffic violation, may not order the driver to exit the car, and thus protract the detention, unless the test announced in Terry has been fulfilled, i.e. unless the officer had a reasonable, articulable suspicion that the driver committed or was about to commit a crime.

The Oakland County Prosecutor filed Leave to Appeal to the Mich Supreme Court and the Defendant filed a Brief Opposing Leave. On March 9, 1989, the Court of Appeals, sua sponte, vacated its judgment in the case and retained the matter for reconsideration. The defendant filed a motion to vacate the order of March 9, 1989, due to lack of jurisdiction. The Court of Appeals summarily denied that motion.

On April 18, 1989, the Court of Appeals released for publication a new opinion affirming defendant's conviction. People v Harmelin, 176 Mich App 524 (1989).

Defendant applied for Leave to Appeal to the Michigan Supreme Court. That application was summarily denied on January 29, 1990. People v Harmelin, 434 Mich 863 (1990).

FACTS OF THE CASE

In the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. The officers observed the defendant's car exiting the parking lot. They were called away on other police business.

Later, they observed defendant's car entering the motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of the defendant's car, the officers noticed nothing unusual or illegal in the manner in which the defendant's car was being driven. They could not see who was driving.

Shortly after 5:00 a.m., the officers saw defendant's car make a turn-around without making a complete stop at a red light (EH1- 8-10). The officers activated their overhead lights and defendant pulled over in a prompt fashion. (EH1-25; EH2- 7,23) Officer Rix approached the driver side of the defendant's car, while Officer Blakeney stayed back by the passenger side of the police car (EH2-25). Officer Rix asked the defendant for his driver license, registration and proof of insurance, and defendant handed him the three items (EH1-11). Defendant then exited the car.

The officers could not remember whether they ordered him out of the car (EH1-27), although Officer Rix testified that under certain circumstances, he would ask a driver to exit the vehicle (T-66). These circumstances are if the driver takes evasive action,

movement while stopping the car, prior information on problems, or if the driver is extremely nervous (T-67). Officer Rix testified that none of these circumstances were present in the instant case at the time the defendant was still in the car (T-68).

Defendant was not observed committing any crime, and did not threaten the officers by word or deed or otherwise act suspiciously (EH1-25,36,37;EH2-25,26,35;T-67,68).

After the defendant was out of the car, Officer Rix went to the rear of the defendant's vehicle (T-69). The defendant followed him back there (T-69). As they were walking to the back of the car, the defendant spontaneously told Officer Rix that he had a CCW permit and a gun in an ankle holster (T-71). That was the first thing the defendant had said, as far as Officer Rix can recall (T-71).

The defendant handed the CCW permit and inspection certificate to the officer (EH1-11). The license was a general unrestricted permit to carry a concealed weapon (EH1-32). Nothing about the document appeared irregular and there was nothing about it that led the officer to conclude that it was not a valid CCW permit (T-74). The officer knew that a CCW permit allows the bearer to carry as many weapons as he may wish (T-75).

Officer Rix testified that he sometimes does a pat down when he stops a person for running a red light, it depends on the circumstances (EH1-37). The unusual circumstance in this instance was that the defendant had a CCW permit and a gun in an ankle holster (EH1-38). Officer Blakeney testified that Officer Rix told him "we're going to do a pat down, he has a gun in an ankle holster."(EH2-27).

Officer Blakeney testified that the defendant appeared "a little bit nervous" (EH2-28), specifically when the officers "told him to put his hands on the car he did so in a jerky type manner"(EH2-29). Officer Rix testified he observed bulges in the defendant's jacket pockets which he thought might be more weapons (EH1-12). Officer Rix explained that "I've been in a situation once

before where a man drew a gun on me , pointed it at me and I wa almost killed. I'm not going to go through that again." (EH1-34).

Officer Rix first noticed the bulges before the defendan handed him the CCW permit (T-78). Officer Rix testified that th defendant followed Rix back to the rear of the car (T-69). Office Rix doesn't remember the defendant saying anything before he sai he had a CCW permit (T-71). Officer Blakeney grabbed the area tha bulged the most (EH2-31;EH1-78). He felt a hard object and aske what it was.(EH2-9) The defendant replied "That's my marijuana. The biggest bulge and the object Blakeney thought was a weapon wa a thin, flat cigarette case (EH2-34). Officer Blakeney opened th case and found marijuana cigarettes inside (EH1-13,79). Th officers then did a complete search of the defendant and found te packets of white powder, three little vials of white powder an assorted pills (EH1-14).

The officers impounded the car "for forfeiture" and searche the trunk of the car back at the police station (EH1-,14,15,56).

While searching the trunk, Rix opened a zippered travel ba and there was "a pile of cash" (EH2-41). They then closed the trun and went to find a superior officer (T-118). Blakeney was excite by finding the money (T-142). Further search revealed a larg amount of cocaine inside a closed shaving kit inside the close travel bag (T-142).

Officer Blakeney did not recall any specific departmenta policy regarding closed containers with regard to inventor searches (T-124). He did not recall if there was any specifi departmental policy concerning opening of bags or suitcases (T 126). Officer Blakeney believes that there is no specific polic as to opening containers (T-130). There is no policy that superior officer must be present at the inventory search tha Blakeney knows of (T-133) and no written policy as to inventory o closed containers (T-165).

REASONS FOR GRANTING THE WRIT

I. THE SEARCHES AND SEIZURES VIOLATED THE FOURTEENTH AMENDMENT AND THE TRIAL COURT ERRED BY FAILING TO SUPPRESS THEIR FRUITS.

Police stopped the car of Defendant Ronald Harmelin for going through a red light at a turn-around without stopping (EH-10). Ultimately, police searched his person and the trunk of his car, and found cocaine. A motion to suppress the fruits of the searches and seizures was denied.

In the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. The officers observed the defendant's car exiting the parking lot. They were called away on other police business. They observed defendant's car entering the motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of the defendant's car, the officers noticed nothing unusual or illegal in the manner in which the defendant's car was being driven. They could not see who was driving.

Shortly after 5:00 a.m., the officers saw defendant's car make a turn-around without making a complete stop at a red light (EH1- 8-10). The officers activated their overhead lights and defendant pulled over in a prompt fashion. (EH1-25; EH2- 7,23) Officer Rix approached the driver side of the defendant's car, while Officer Blakeney stayed back by the passenger side of the police car (EH2-25). Officer Rix asked the defendant for his driver license, registration and proof of insurance, and defendant handed him the three items (EH1-11). Defendant then exited the car.

The officers could not remember whether they ordered him out of the car (EH1-27), although Officer Rix testified that under certain circumstances, he would ask a driver to exit the vehicle (T-66). These circumstances are if the driver takes evasive action, movement while stopping the car, prior information on problems, or

if the driver is extremely nervous (T-67). Officer Rix testified that none of these circumstances were present in the instant case at the time the defendant was still in the car (T-68).

Defendant was not observed committing any crime, and did not threaten the officers by word or deed or otherwise act suspiciously (EH1-25,36,37;EH2-25,26,35;T-67,68).

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Officer Blakeney testified that the defendant appeared "a little bit nervous" (EH2-28), specifically when the officers "told him to put his hands on the car he did so in a jerky type manner"(EH2-29). Officer Rix testified he observed bulges in the defendant's jacket pockets which he thought might be more weapons (EH1-12). Officer Rix explained that "I've been in a situation once before where a man drew a gun on me , pointed it at me and I was almost killed. I'm not going to go through that again." (EH1-34).

Officer Rix first noticed the bulges before the defendant handed him the CCW permit (T-78). Officer Rix testified that the defendant followed Rix back to the rear of the car (T-69). Officer Rix doesn't remember the defendant saying anything before he said he had a CCW permit (T-71). Officer Blakeney grabbed the area that bulged the most (EH2-31;EH1-78). He felt a hard object and asked what it was.(EH2-9) The defendant replied "That's my marijuana." The biggest bulge and the object Blakeney thought was a weapon was a thin, flat cigarette case (EH2-34). Officer Blakeney opened the case and found marijuana cigarettes inside (EH1-13,79).

The officers then did a complete search of the defendant and found ten packets of white powder, three little vials of white powder and assorted pills (EH1-14).

The officers impounded the car "for forfeiture" and searched the trunk of the car back at the police station (EH1-,14,15,56).

While searching the trunk, Rix opened a zippered travel bag and there was "a pile of cash" (EH2-41). They then closed the trunk and went to find a superior officer (T-118). Blakeney was excited by finding the money (T-142). Further search revealed a large amount of cocaine inside a closed shaving kit inside the closed travel bag (T-142).

Officer Blakeney did not recall any specific departmental policy regarding closed containers with regard to inventory searches (T-124). He did not recall if there was any specific departmental policy concerning opening of bags or suitcases (T-126). Officer Blakeney believes that there is no specific policy as to opening containers(T-130). There is no policy that a superior officer must be present at the inventory search that Blakeney knows of (T-133) and no written policy as to inventory of closed containers (T-165).

A. The frisk of his person.

The question at issue here is whether advising a police officer that one is carrying a licensed weapon, and presenting the license and inspection certificate, entitles the officer to pat down or search the individual. The stop of the vehicle to issue a traffic ticket was one intrusion on Fourth Amendment interests, a legally authorized intrusion. The frisking and searching of the defendant and his car constitute separate and distinct intrusions on Fourth Amendment rights.

After the legitimate stop to issue a non-custodial civil infraction citation, the officer committed a second intrusion, a "stop and frisk" of the sort sometimes authorized by Terry v Ohio, 392 U.S. 1; 88 S.Ct. 1868; 20 L.Ed.2d 889 (1968) under certain circumstances.

Ordinarily, the possession of a concealed weapon is itself a crime, and an officer can seize the contraband item. However, a lawfully possessed weapon is not lawfully subject to seizure, and therefcre cannot reasonably be the subject of a search. Pursuant to the terms of the general CCW, any weapon found on Mr. Harmelin could not be seized, and would have to be returned to him (EH1-32).

The "pat-down" search for weapons constitutes an intrusion on Fourt Amendment rights. Terry v Ohio, supra. "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." Terry, supra. In this case, the defendant was leaning with his hands against his car, with his legs spread, while two officers searched him (EH1-39,40).

Under Terry, the police officer is permitted to intrude on a citizen's Fourth Amendment privacy and make a pat-down "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is

afoot an that the persons with whom he is dealing may be armed and presently dangerous." Terry, 30.

Here, as in People v Burrell, 417 Mich 439 (1983), "No specific inferences of criminal activity could possibly be drawn from these facts." Mr. Harmelin's car approached a red light at a left lane turn-around. The officer observed the car "slowed, hit it's brakes, but just kept going." (EH1-23). Other than that, the defendant's driving was not unlawful in any way. He did not attemptto flee (EH1-25). He produced a driver license, registration and proof of insurance. He spontaneously informed the office that he had a CCW permit which he produced and informed the officer of the gun in the ankle holster.

Both officers testified that the defendant was nervous; Officer Rix testified that other than the defendant being nervous there was nothing else unusual about him "but I would rather have the elements of surprise with me than with him" (T-79). Officer Blakeney testified that the defendant was " a little bit nervous" (EH2-29) specifically, when the officers "told him to put his hands on the car he did so in a jerky type manner" (EH2-29).

Officer Rix testified he observed bulges in the defendant's jacket pockets which he thought might be more weapons (EH2-12). Officer Rix explained that "I've been in a situation once before where an man drew a gun on me, pointed it at me and I was almost killed. I'm not going to go through that again." (EH1-34). Oddly enough, Rix testified that he noticed the bulges before the denfendant handed him the CCW permit (T-78) yet Rix testified that the defendant followed Rix to the back of the car (T-69). Therefore, we must conclude that Rix turned his back on the defendant and the bulges that so concerned him. An even more telling fact is that the police allowed the defendant's gun itself to go untouched while the officers searched his coat (EH1-40-43). The officers showed far more interest in the contents of his cigarette case that in his gun.

Another telling fact is that the biggest bulge turned out to be a "thin flat cigarette case" (EH2-31;EH1-78). The record

seems to suggest that the only reason the police patted down the defendant was because he was seen three times leaving the Embassy Motel, a location where crimes have occurred in the past, and he had a gun in an ankle holster. The mere fact that the defendant was seen leaving the Embassy Motel would not justify a search. The only other circumstance that the police articulated was that the defendant was either "extremely" or "a little bit" nervous, especially when he was told to put his hands on the car. However, any citizen would be a little bit nervous when directed to "spread 'em" by two uniformed officers and for apparently no reason other than making a rolling stop at a stop sign.

Mr. Harmelin was stopped for a civil infraction, not a criminal offense. Arrest was not a possibility (T-36). Defendant took no action that caused the officer to fear for his safety (EH1-25,36-37;EH2-25,26,35).

These circumstances are very much like People v Gonzales, 356 Mich 247 (1959), where the Michigan Supreme Court stated:

> "The officers had no reason to suspect any violation of the law other than the traffic offense for which the summons was issued to Leal. Further, we feel the record clearly shows that the officers had no intention of incarcerating Leal or detaining him any further. There were no fruits of the traffic offense to search for, nor any need to search for the means by which it had been committed. And since mo further detention was comtemplated there was no need to search for weapons or other means of possible escape from custody."

The officers in Gonzales were in the habit a "checking cars quite thoroughly at that time" apparently referring to the early hours of the morning. Officer Rix in the instant case testified that he searched Mr. Harmelin "because he had a gun" (EH1-12). Yet Mr. Harmelin had a legal right to carry that gun just as he had a legal right to leave the Embassy Motel that night.

Circuit Court Judge Anderson ruled that the frisk was lawful because "it appeared to someone, the police. that something wasn't 100 percent." (EH2-60). This ruling is precisely what the Fourth Amendment was enacted to protect against--arbitrary interference with basic human dignity in our cities.

Judge Anderson heard two days of testimony by the officers, and the appellate courts generally give deference to the trial

court because they are able to judge the credibility of the witnesses. After two days of testimony, he felt that the officers had frisked the defendant "because something wasn't 100 percent." This conclusion does not reach the standard required by Terry v Ohio.

The Court of Appeals reversed the trial court in their first opinion. The panel apparently felt that Mr. Harmelin was searched for no reason. Their second opinion, which defendant concludes was the result of ex-parte communications (see issue IV), concludes:

> "[I]t was reasonable to conclude that criminal activity might have been afoot and that the defendant might have been armed and dangerous."
> --People v Harmelin, 176 Mich App 524, 532 (1989).

What criminal activity might have been afoot? The officers testified that the Embassy Motel was a drop off spot for stolen cars, but the defendant's car was completely legal. And if the defendant was dangerous, why would he tell the officers that he had a gun and a permit?

The defendant submits that the trial court correctly summed up the testimony of the police officers, that they had no reason to frisk Mr. Harmelin. Of course police officers would feel safer if they were allowed to routinely frisk everyone they encounter, but this is precisely what the Fourth Amendment prohibits. The fact that Officer Rix had been shot before, and he didn't like the fact that the defendant had a licensed weapon in an ankle holster is no justification for this frisk. The fact that the biggest bulge the officers saw turned out to be a "thin, flat cigarette case" suggests that the real reason for the search was not because they wanted to be sure he had no other weapons, but that they were just searching for evidence of other crimes.

There was no justifiable reason for the frisk in this case, and therefore the evidence and its fruits should be suppressed. US Const, Amend IV. Since all the evidence in this case flowed from the illegal frisk, the evidence should be suppressed and the defendant discharged. Wong Sun v United States, 371 U.S. 471; 83 S.Ct. 407; 9 L.Ed.2d 441 (1963).

B. The examination of the cigarette case.

If a frisk were lawful, it must still be confined to the cause for the frisk, i.e., to look for dangerous weapons. Terry v Ohio, supra at 29. The officer therefore had no right either to look inside the "little flat" cigarette case (EH 1,45) or ask about its contents.

Defendant, at the time of the frisk, was leaning with his hands against the car, with his legs spread. (EH1,39-40). This was not a casual interview in the person's own office. Rather, defendant was clearly "deprived of his freedom of action in a significant way". Miranda v Arizona, 384 U.S. 436, 444; 86 S.Ct. 1602; 16.L.Ed 2d 694 (1966). The questioner was looking for incriminating answers, but failed to give warnings required under Miranda v Arizona. The questioning was therefore unlawful, and the subsequent opening of the cigarette case, based on the answer to the questioning, was the fruits, and again must be suppressed, along with the fruits of the marijuana arrest. Dunaway v New York, 442 U.S. 200; 99 S.Ct. 2248; 60 L.Ed.2d 824 (1979).

C. The impoundment of the car.

The police indicated that they impounded Mr. Harmelin's car and did a routine inventory search of the vehicle. The Court of Appeals, however, found that the record in this case established that the Oak Park Police Department's standardized procedures did not mandate searching and conducting an inventory search of every container within an impounded vehicle; and that therefore the inventory search done in this case does not fall within the parameters of Colorado v Bertine, 479 U.S. 738; 107 S.Ct. 738; 93 L.Ed.2d 739 (1987). In Bertine, the United States Supreme Court held that the Fourth Amendment does not prohibit an inventory search by police if the police follow standardized procedures. They added in footnote 6 on page 742:

> "We emphasize that, in this case, the trial court found that the police department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria. See Lafayette, 462 U.S., at 648, 103 S.Ct. at 2610; Opperman, 428 U.S. at 374-5; 96 S.Ct. at 3099-3100.

Since the police officers in this case did not know if there was a specific departmental policy regarding the inventory of closed containers (T-124,130,133,165), they could not have been following standardized procedures. Thus, the evidence in the instant case was recovered in violation of Colorado v Bertine, and should be suppressed.

The Michigan Court of Appeals opined that the search in this case falls within the automobile exception to the warrant requirement enunciated in United States v Ross, 456 U.S. 789; 102 S.Ct. 2157; 72 L.Ed.2d 572 (1982)

In Ross, the police were acting on information from a reliable informant that there were narcotics in a certain automobile trunk, and that a certain person would be driving the automobile. The officers stopped the defendant, opened the trunk, and discovered heroin in a closed container. The police then drove the car to the station, searched it more thoroughly, and discovered a zippered pouch containing cash. At no time did the officers attempt to obtain a warrant. The United States Supreme Court held that police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within may conduct a warrantless search of the vehicle as thorough as a magistrate could authorize in a warrant.

The Ross case does not apply to this case for two reasons. The first reason is that these police officers testified that they were conducting an inventory search. This search was invalid because they did not follow standardized procedures. Therefore the search was not a legal one. Furthermore, Ross and the "automobile exception" do not address inventory searches.

The Michigan Supreme Court addressed this latter issue in People v Long (On Rem), 419 Mich 636. In Long, police followed the defendant because he was speeding. Long got out of the car and from

his demeanor, the police formed the opinion he was "under the influence of something." The police followed Long as he moved back toward the car, and they saw a knife on the floorboard. Shining a light in the interior of the car, the officer saw something under the armrest. It was a pouch of marijuana. The police decided to impound the car. The deputy opened the trunk and found 75 pounds of marijuana. The government argued the search was a valid inventory search. In footnote 2, page 648, the Michigan Supreme Court said:

> "2. Plaintiff, in a brief footnote, concludes that the search of the trunk may have arguably been a search incident to defendant's arrest. We decline to rule on that question as the argument is not relied upon or developed in this case. Nor does the plaintiff rely upon the "automobile exception" to the warrant requirement in order to justify the search of the trunk. Cf. United States v Ross, [456] U.S. [798];(search of closed container in automobile). **Furthermore, Ross and the automobile exception do not address inventory searches. Id, p 809,fn 11.** [Emphasis added].

The Michigan Supreme Court was correct in its careful reading of Ross, which does not address inventory searches and should not be read to condone a constitutionally invalid inventory search.

Secondly, in Ross, the police had been told by an informant there were drugs in the trunk. In Harmelin's case, the police had no such knowledge. As a matter of fact, the Oak Park Police were surprised and excited to discover money in Mr. Harmelin's trunk--so excited that they hurriedly close the trunk back up and go to get a superior officer.

The true issue here is whether or not this was a valid inventory search. The testimony of the officers shows that the Oak Park Police Department's standardized procedures did not mandate searching and conducting an inventory of the contents of every container within an impounded vehicle such as the defendant's; thus, the inventory search done in this case was invalid under Colorado v Bertine, supra.

D. The search of containers and their contents.

Upon opening the trunk, the officers found a shaving kit with other containers inside, and opened them and searched them. The opening of closed containers, without a warrant or probable cause, was unlawful. United States v Chadwick, 433 U.S. 1;97 S.Ct. 2476; 53 L.Ed.2d 538 (1977).

A car trunk, while not completely safe, is universally considered to be a reasonably safe place to store personal goods. If the defendant trusts his own car trunk as safe, the police have no real need to search the trunk for the defendant's "own protection". A defendant can waive virtually any right, including the right to trial itself. In a society with a Fourth Amendment, where the right to privacy in personal effects is supposed to be protected, a citizen may choose to leave his property locked in a car trunk at minimal risk, without having it searched by police.

Defendant concludes that the frisk of his person, and all the police actions thereafter, were unlawful, and that the fruits, i.e., all items found on Mr. Harmelin and in his car, must be suppressed. U.S. Const, Amend IV.

II. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE RIGHT TO PLEAD NOT GUILTY WHERE, DESPITE HIS PLEA OF NOT GUILTY, HIS ATTORNEY FAILED TO ARGUE THAT THE TRIAL RECORD PROVIDED A BASIS FOR FINDING THE DEFENDANT NOT GUILTY.

Defendant Ronald Harmelin was charged with knowing and intentional possession of over 650 grams of cocaine and possession of a firearm during a felony. He pled not guilty. Defense counsel Curtis Rundell presented a Motion to Suppress the evidence on the ground of illegal search, which was denied by the Hon. Robert Anderson before trial. A bench trial was then held before the Hon. Gene Schnelz.

Defense counsel gave an opening argument. (T 21-24). The argument, however, did not discuss anything at issue in the trial. The opening argument dealt entirely with the question of illegal search. Counsel did not suggest any reason to question the Defendant's guilt. Indeed, after discussing the search question, counsel stated, "From there on, I have no argument with the prosecutor's opening statement in terms of recitation of facts." (T 24).

After examination of Officer Rix, counsel cross-examined him. (T 50-89). However, all of the questioning dealt with the issue of search. Counsel began by inquiring into whether there was a basis for stopping the car in the first place. (T 51-63). Counsel then moved on to whether Defendant did anything to justify the pat-down search. (T 66-89). His questioning was in most respects simply a rerun of the questioning from hearing on the Motion to Supress. This excerpt is typical of the questioning (T 84-85).

"Q Did you tell Officer Blakeney why you were going to do a pat-down search?

A No. I just told him Harmelin had a gun.

Q Why did you do a pat-down search?

A I was afraid for our safety.

Q What else was there about Mr. Harmelin that prompted you to decide to do a pat-down search?

The main difference between defense counsel's questioning at the evidentiary hearing and the trial was that at trial counsel added questioning designed to question whether the officers really did or did not see bulges in the coat. (T 76-82). Clearly, whether the officer really did or did not see bulges in the coat was relevent only to the legality of the officer's actions, and was not relevant to the issues at trial: whether Defendant Harmelin knowingly and intentionally possessed over 650 grams of cocaine found in by the officers in his car trunk.

The situation with the second officier was similar. The officer was questioned about the inventory search, the impoundment and search policies of the Oak Park Police Department, etc. (T 120-133). He was also ask about whether there was discussion about getting a search warrant, and what made the officer "suspicious." (T 136-7) Counsel established in detail the steps taken by the officier to discover the cocaine that was found in the trunk. (139-142).

He then returned to the officier's actions, thoughts and motivations during the search of Defendant's person (T 145-151). Counsel then recalled Officer Rix, and had Defendant put on the jacket with the items restored to the pockets, to demonstrate that the alleged bulges could not really be seen. (T 153-158). He moved on to the circumstances of the trunk search, in what order things were searched, and how those actions measured up to the departmental policies. (T 159-168).

In closing argument, defense counsel reargued the suppression issue. See T 176:

> "First, prior to the comencement of the proofs this morning I asked to renew my motion or motions with regard to suppression of evidence in this matter, and I recognize that there does seem to be a body of case law that indicates that a circuit judge is not in a posture or position to overrule a determination on an issue previously rendered by yet another circuit judge, particularly of the same circuit, I suppose.
> However, the testimony in this case has now brought to light certain factors..."

The closing argument dealt entiraly with the legality of the search. See, e.g., 177: "at that point in time it was incumbant upon him, having abandoned the search, to secure an appropriate warrant to allow the search of that vehicle." See, e.g., T 183: It is, I submit, a clear violation of the rights assured us by our Constitution of the United States and by the State of Michigan, which are a right secure in our premises and our person." Counsel concluded his argument as follows (T 184):

> "MR RUNDELL: ...I would ask the Court therefore to rule that the evidence seized was seized inappropriately, is not admissible, and therefore cannot be considered by the Court in rendition of a verdict and thus, the case must fall and the defendant should be discharged.

Present counsel concedes that Mr. Rundell did a competent and professional job at rearguing the suppression motion to Judge Schnelz during the course of the trial, although it would have been better for him to cite to People v Sacorafas, 76 Mich App 370 (1977), expressly giving the successor judge power to redetermine admissibility rulings made by the first judge.

The problem is that Mr. Rundell did not put on any kind of a trial defense whatsoever. He did not give the judge any cause to think the Defendant might be innocent, nor did he argue that the elements of the offense were not adequately proven. He did not contest the guilt of the Defendant in any way.

In Wiley v Sowders, 647 F2d 642, 648-649 (CA 6, 1981), the Court held:

> "The decision to pled 'guilty' or 'not guilty' is a decision reserved soley for the accused based on his intelligent and voluntary choice...
> An attorney may not stipulate to the functional equivalent of a guilty plea."

Similarly, the Sixth Circuit, in Martin v Ross, 747 F2d 1245 (CA 6, 1984), granted habeas corpus, stated:

> "Martin's trial counsel 'stood mute,' offering the jury virtually no choice but to convict him, in spite of his plea of not guilty'. CF. Wiley, 647 F2d at 650 (constitutional right not to plead guilty obliges attorney to 'structure the trial of the case around the client's plea.')."
> The situation in the instant case is virtually identical

to that in Wiley and Martin. The only argument made by defense

counsel did not urge a not guilty verdict. In other words, counsel argued to Judge Schnelz in his capacity as judge determining admissibilty of evidence, but made no argument at all to Judge Schnelz in his capacity as trier of fact in a trial.

Defense counsel offered the trier of fact "virtually no choice but to convict him, in spite of his plea of 'not guilty'". Martin v Rose, supra. By failing to present any argument that the prosecutor's case was not proven, defense counsel failed to structure the trial around his client's plea of not guilty. The so-called "trial" was nothing more than a suppression hearing coupled with "the functional equivalent of a guilty plea." Wiley v Sowders, supra.

In accord, see also United States v Cronic, 466 U.S. 648, 659; 104 S.Ct. 2039; 80 L.Ed.2d 657 (1984), finding a denial of right to counsel where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." See also, People v Fisher, 119 Mich.App. 445 (1982); People v Carter, 41 Ill.App. 425; 354 N.E.2d 482 (1976). and People v Hattery, 109 Ill. App.2d 449; 488 N.E.2d 513 (1986), each of which found ineffective assistance of counsel where counsel failed to advocate the client's position of guilty.

Mr. Harmelin concedes that, if admissible, the evidence against him was quite strong. However, whether the evidence is weak or strong, the Defendant is entitled to plead not guilty, and is entitled to have an attorney argue that the prosecutor's case has not been proven.

As an example, the Michigan statute requires that possession be knowing and intentional. MCL 333.7403. Counsel could have structured the case around the theory that the elements of knowledge and intent were not proven, because there was no direct evidence that Defendant knew the drugs were in the trunk. Even when evidence is overwhelming, a plea of not guilty means the defense counsel must put on a defense. As the Court held in People v Hattery, supra, 488 NE2d at 519:

> "Although counsel's strategy may have been reasonable in light of the evidence--a point we need not consider-

> -it was an impermissible one. Even when no theory of the defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt."

Defendant was deprived of effective assistance of counsel. Strickland v Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); People v Garcia, 398 Mich 250 (1976); Martin v Rose, supra; Wiley v Sowders, supra; United States v Cronic, supra. Defendant was deprived of his right to plead not guilty. Martin v Rose supra; Wiley v Sowders, supra.

Ineffective assistance of counsel is manifest, with or without an evidentiary hearing. Pursuant to People v Ginther, 390 Mich 436 (1973), an evidentiary hearing should have been ordered to determine this issue of ineffective assistance of counsel. However, even without further evidentiary support, a new trial is required to remedy this Sixth Amendment violation.

III. THE MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Defendant Ronald Harmelin was convicted of possession of over 650 grams of cocaine. Pursuant to statute, MCL 333.7403, Judge Schnelz imposed the mandatory sentence of life imprisonment without possibility of parole.

The U.S. Constitution bans punishments for crimes which constitute cruel and unusual punishment. U.S. Const, Amend VIII. The federal and state courts have long recognized the judicial duty to set aside sentences violating these provisions. Weems v United States, 217 U.S. 349; 30 S.Ct. 544; 54 L.Ed.2d 637 (1983).

The length of sentence alone is a valid ground for finding cruel and unusual punishment. Solem v Helm, 463 U.S. 277; 103 S.Ct.3001; 77 L.Ed.2d 637 (1983). The Eighth Amendment prohibits "sentences that are disproportionate to the crime committed." Solem v Helm supra.

Considering proportionality of the sentence to the crime, there is no other crime in Michigan for which the punishment is mandatory life without parole except for first degree murder. A person with a long criminal record could commit the foulest atrocities, such as holding people capitive for years as sexual slaves, hacking off limbs, or poking out eyes of children, or attempting to assassinate public officials, without even the possibility of receiving a sentence as high as Ronnie Harmelin. In contrast, Ronnie Harmelin, for possessing a substance one can buy freely and legally on the streets of Peru, had to receive a sentence of life without parole regardless of how the judge evaluated his character. The judge was compelled by statute to ignore the fact that Ronnie had absolutely no criminal record, that he harmed no one, that he did not display viciousness, that he did not demonstrate an inability to reform.

If the substance in Ronnie's trunk had turned out to be over 650 grams of cyanide, enough to kill hundreds of thousands of innocent people, he would have gone completely unpunished. Even if the police found with the cyanide a note in the Defendant's handwriting outlining a plot to use the cyanide to poison municipal water supplies, he still could not be punished as harshly as he has been for possessing cocaine.

No other jurisdiction in the United States has penalties even coming close to the harshness of Michigan's. People v Harman, 124 Mich App 93, 104 (1983) (partial concurrences of M. Kelly, J.). Indeed, under federal law, if a first offender possessed the same amount of cocaine as did Mr. Harmelin, the maximum penalty would be a term of not less than 5 or more than 40 years in prison. 21 U.S.C. S841 (b)(1)(B)(ii). If that same first offender possessed more than 5 kilograms of cocaine (eight times the amount of cocaine possessed by Defendant Harmelin), the maximum penalty would be a term not less than 10 years or more than life. 21 U.S.C. S84(b)(1)(B)(ii). He would be eligible for parole after serving 1/3 of the sentence, or ten years in the case of a life sentence or sentence of more than 30 years. 18 U.S.C. S4205(a).

The federal provisions are themselves quite harsh, but do not even begin to approach the unspeakable cruelty of the present Michigan provisions. The judge cannot give a sentence of less than life, and the Parole Board cannot issue a parole, ever.

In applying the evolving standards of decency test described in Solem v Helm, we look in part to the vast discrepancy between the Michigan provisions and those of other American jurisdictions. We look also to the fact that judges such as Judge Norman Lippitt of Oakland County have refused to sentence people under this Act, refusing to become a party to the barbarity of these provisions (as reported in the newspapers). We also look to the fact that at least two judges of the Michigan Court of Appeals, as well as former Judge Bert Hensick of Livingston County, have reached the conclusion that this extreme penalty is inconsistent with the constitutional guarentees against cruel and unusual punishment. See

People v Harman, supra, (partial concurrence of M.J. Kelly, J.) People v Harding, 163 Mich App 298 (1987)(dissent D.E. Holbrook, P.J. More recently, Judge Vera Massey Jones of Detroit Recorder's Court sentenced a defendant who was convicted by a jury of possession of over 650 grams of cocaine. The judge refused to sentence him to mandatory life without parole, instead sentencing the defendant to 40 -100 years incarceration. See People v Dwight Rashad, #88-011275.

Rehabilitation is another factor to be considered in the cruel and unusual punishment analysis. Locked in prison for life, what possible incentive can Ronnie Harmelin and others like him have to turn from drugs? Indeed, isn't the likeliest outcome that people like Ronnie, thrown into the pit of prison for all eternity without the hope of release, will turn to drugs even more?

To be thrown into prison for life, without possibility of release, really is a horrible thing to happen to a person. To take away everything that people hope and dream for in their lives, the big things and the little things, forever, with no hope of redemption, is a most profoundly harsh thing for a Government to do to one of its citizens. Such a punishment may well be appropriate recompense for the most vicious of cruelities. But, what about a nonvicious person who makes a mistake in judgment?

Surely, some people who get involved with drugs must be capable of rehabilitation. Judge Douglas Ginsburg, despite admitted drug involvement, is considered fit to sit as a Judge on the U.S. Court of Appeals for D.C. Circuit. The record is unmistakeably clear that persons involved in drugs are capable of reform.

In Solem v Helm, this Court held that it was not proportional to give a nonviolent offender a life sentence that deprives him of all hope of release. The statutory scheme compelling a sentence of life without parole regardless of individual circumstances cannot be justified under either authority.

Defendant incorporates by reference into this argument the well-reasoned opinion of Judge Kelly in People v Harman. Counsel is aware that in Harman and Harding themselves, as well as a few other cases, the Michigan Court of Appeals majorities have rejected the claim of cruel and unusual punishment. Counsel submits that a hundred or even a thousand such judicial decisions could not make right that which is so clearly wrong. Judges in Salem, Massachusetts undoubtly approved the burning of witches at the stake, but their approval could not make it right. Our descendants will look back on this peculiar period of our history with horror and shame, much as we now look back on our ancestors' practice of setting fire to eccentric old women for the good of the community.

The Court of Appeals decisions approving this practice have used reasoning that could approve a life sentence for any crime. for example, in People v Harman, 124 Mich App at 98, approving the holding in People v McCarty, 113 Mich 464 (1982), that the sentence was constitutional, the Court stated:

> "The bases for this holding, with which we agree, were that the mandatory life sentence for the offense to prevent the offender from causing injuries to others by reason of involvment with large quantities of cocaine and society's need to deter individuals from engaging in the proscribed conduct."

Every sentence is intended to prevent the offender from causing injuries to others, and to deter individuals from engaging in proscribed conduct. The reasoning of McCarty and Harman would justify a mandatory sentence of life without parole for every crime.

The reasoning of these cases fails to discuss why it is prpportional that a first offender guilty of this crime should be given this horrifying treatment, while even repeat offenders guilty of rape, robbery and attempted murder are not treated this harshly. The reasoning that the mandatory life sentence will prevent the offender from causing injuries to others by reason of involvement with large quantities of cocaine and society's need to deter individual's from engaging in the proscribed conduct would only be valid if the defendants in these cases were the drug kingpins. Instead they seem to be merely the "mules" of transport and when

arrested are easily replaced by new personnel. This mandatory sentence law does nothing to deter the real drug kingpins, nor does it help protect society from drugs.

The common sense of society, as reflected in the laws of 49 states and the US, is that proportional sentencing demands a sentencing scheme more humane than what Michigan has enacted. The very purpose of the Eighth Amendment is to correct such deviations from proportionality when they arise.

IV. THE COURT OF APPEALS LACKED JURISDICTION TO REVERSE THEMSELVES ON THEIR OWN MOTION.

Defendant-Appellant RONALD HARMELIN was convicted and sentenced in Oakland Circuit Court. The Court of Appeals reversed his conviction in an unpublished opinion dated January 9, 1989 because of an unconstitutional seizure. The Oakland County Prosecutor filed a timely Application for Leave to Appeal in the Supreme Court. The Court of Appeals then issued an order on March 9, 1989, vacating the judgment of January 9, 1989.

The defendant filed a Motion to Vacate Order of March 9, 1989 in the Court of Appeals. The Court denied that motion and issued a new opinion affirming the defendant's conviction on April 18, 1989.

In Michigan, once a claim of appeal is filed in a higher court, the lower court lacks jurisdiction in the case until the higher court acts. Moffit v Sederlund, 145 Mich App 1 (1985); People v George, 399 Mich 638 (1977); People v Kennedy, 384 Mich 339, 343 (1971).

The cases consistently hold that the filing of an Application for Leave to Appeal in a higher court vests jurisdiction in that court. The only matters that the lower court can retain some jurisdiction on is a collateral question such as bond. The lower court lacks jurisdiction over all other matters. People v Wells, 403 Mich 809 (1978).

The Michigan Statute on point, MCL 600.314; MSA 27A.314, provides: "the decisions on appeal of the court of appeals are final, except as reviewed by the supreme court as provided by supreme court rule."

The court rule, MCR 7.201(D), states:

> The court shall sit to hear cases in panels of three judges. The decision of a majority of the judges of a panel in attendance at the hearing is the decision of the court. Except as modified by the Supreme Court, a decision of the court is final.

The decision of a majority of the judges of the panel in attendance at the hearing in the instant case was that an illegal

seizure had occurred. Neither party made a motion for reconsideration. Neither party cited the authority the Michigan Court of Appeals relied upon to reverse themselves. The defense can only conclude that the court was influence by some sort of ex parte communication or political pressure. Even the hint of impropriety cannot be tolerated in the judiciary.

The Michigan's courts' failure to follow their own rules violated due process. U.S. Const., Amendment XIV. When a court acts outside of its jurisdiction, the defendant's right to due process is also violated. The Michigan Court of Appeals decision of January 9, 1989 was final and should be reinstated.

CONCLUSION

Petitioner Ronald Harmelin respecfully submits that, for the reasons stated above, the Michigan courts of last resort have interpreted the United States Constitution in ways that conflict with prior rulings of this and other courts, both federal and state courts of last resort. The resulting injustice of a man punished for life without parole under the circumstances of this case, is compelling reason for the United States Supreme Court, the individual's last resort to grant Ceriorari either by plenary consideration or summary reversal.

Respectfully submitted,

Ronald Harmelin

Ronald Harmelin,
In Proper Persona
188131
Scott Regional Correctional Facility
Plymouth, Michigan 4817 #P 36282

Dated: 3-29-90

APPENDIX

1. Michigan Court of Appeals Opinion, 1/9/89
2. Michigan Court of Appeals Order (vacating), 3/9/89
3. Michigan Court of Appeals Order (denying rehearing), 4/18/89
4. Michigan Court of Appeals Opinion (reconsideration), 4/18/89
5. Michigan Supreme Court Order (denial of leave), 1/29/90
6. Affidavit of Defendant-Petitioner, 1/5/88
7. Newspaper Clipping, Detroit Free Press, 4/29/89
8. Newspaper Clipping, Michigan Lawyers Weekly, 3/20/89

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

RONALD ALLEN HARMELIN,
Defendant-Appellant.

JAN 0 9 1989

No. 101536

Before: Wahls, P.J., Hood and N.J. Kaufman*, JJ.

PER CURIAM

Defendant, Ronald Allen Harmelin, was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2), and was sentenced on April 30, 1987, by the Oakland Circuit Court to a mandatory life term of imprisonment for the cocaine conviction and a mandatory two-year term of imprisonment for the felony-firearm conviction. On appeal, defendant argues that his convictions must be reversed because the evidence against him was obtained as a result of an unconstitutional seizure and pat-down search of his person and an unconstitutional search of his car; that his convictions must be reversed because he was deprived of the effective assistance of counsel; and that his sentence for the cocaine conviction must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constittutes cruel and unusual punishment. We find that defendant's convictions must be reversed because the evidence used against him was obtained as a result of an unconstitutional seizure of his person.

The record reveals that in the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles.

*Retired Court of Appeals judge, sitting on the Court of Appeals by assignment.

Numerous stolen vehicles had been found in this lot in the past. At this time, the officers observed defendant's car exiting the parking lot, and although they were called away on other police business at various times that morning, they saw defendant's car entering the Embassy Motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of defendant's car, the officers noticed nothing unusual or illegal in the manner in which defendant's car was being driven.

Shortly after 5:00 a.m., while continuing to patrol the area around the Embassy Motel, Officers Rix and Blakeney saw defendant's car make a U-turn at the intersection of Eight Mile and Hubbell Roads, a high-crime area, without stopping for a red light. When the officers, in their patrol car with its overhead lights flashing, pulled behind defendant's vehicle, defendant responded by stopping in a reasonably prompt fashion. Officer Rix walked to the driver's side of defendant's car, while Officer Blakeney positioned himself at the passenger side of the car. Defendant, who remained seated in his car, complied in a cooperative manner upon being requested by Officer Rix to produce a driver's license and vehicle registration. Defendant then stepped out of his car. Neither of the officers could recall whether defendant was ordered out of his vehicle or whether he got out of it on his own initiative, although Officer Rix testified that if he did in fact order defendant out of the car, that order would have been prompted solely by the nervous behavior exhibited by defendant -- behavior described as defendant's having "trouble getting some of the words out." In any event, after exiting his car, defendant, in a nervous manner, informed Officer Rix that he was carrying a pistol concealed in an ankle holster. He explained that he had a permit for the weapon, however, and that he did not want the officers to become alarmed. He then handed Officer Rix a general permit to carry a concealed weapon as well as a safety inspection certificate for the .38 caliber, five-shot revolver, which was later found in his ankle holster.

After looking at the firearm documents proffered by defendant, Officer Rix observed nothing which suggested that the papers were possibly invalid. Nonetheless, because defendant appeared to be nervous, because he was armed, albeit legally, and because he had a bulge in one of his coat pockets, Officer Rix, fearing for his own safety and sensing that "[t]here was something wrong," decided to conduct a pat-down search of defendant. In doing so, some marijuana was discovered, and defendant was placed under arrest.

In searching defendant after his arrest, the officers found other incriminating evidence in defendant's possession, including assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia and a telephone beeper. Later, pursuant to the standard policy of the Oak Park police department, defendant's car was impounded for a possible forfeiture action, and an inventory search was conducted. During this search, a satchel containing a shaving-kit bag was discovered in the trunk. The kit contained $2900 in cash and two bags of white powder subsequently determined to be 672.5 grams of cocaine. A fingerprint expert testified that defendant's fingerprints were found on books located inside the satchel and next to the bags of cocaine.

Defendant neither testified in his own behalf nor presented any witnesses.

On appeal, defendant first argues that the detention and pat-down search conducted by the police violated his Fourth Amendment right to be secure against unreasonable seizures and did not fall within the stop-and-frisk exception to the warrant requirement first enunciated in Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), because the detention and search could not be justified by any articulable suspicion or objective manifestation that he was engaged, or about to be engaged, in criminal activity. In Terry, the locus classicus of stop-and-frisk law, the United States Supreme Court created a limited exception to the requirement of showing probable cause in the

seizure of a person by a police officer if the officer had a reasonable, articulable suspicion that the person committed, or was about to commit, a crime. Under the Terry rule, once an officer has reasonably concluded that criminal activity may be afoot, he can conduct a pat-down search if he reasonably concludes that the person seized may be armed and dangerous. See People v Payton, 166 Mich App 428, 430-431; 421 NW2d 191 (1988); People v Peyton, 167 Mich App 230, 236-237; 421 NW2d 643 (1988). In the present case, defendant, prior to trial, moved to suppress the narcotics evidence against him on the ground that the detention and pat-down search to which he was subjected violated his Fourth Amendment rights. Of course, it is well established that evidence derived from an illegal seizure must be suppressed as the "fruit of the poisonous tree." Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963); People v Shabaz, 424 Mich 42, 65; 378 NW2d 451 (1985), cert dis ____ US ____; 106 S Ct 3326; ____ L Ed 2d ____ (1986). The trial court denied defendant's pretrial suppression motion. This Court will not disturb a trial court's ruling on a suppression motion unless that ruling is clearly erroneous. Payton, supra, p 430; Peyton, supra, p 235; People v Burrell, 417 Mich 439, 448; 339 NW2d 403 (1986). We will find such a ruling clearly erroneous if firmly convinced that a mistake has been made. People v Daniels, 160 Mich App 614, 617; 408 NW2d 398 (1987).

In the present case, defendant, without doubt, was lawfully stopped for running a red light, which is a civil infraction, MCL 257.611; MSA 9.2311; People v Laube, 154 Mich App 400, 407; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987). It seems fairly clear that after defendant was lawfully stopped and produced his driver's license and vehicle registration, Officer Rix ordered defendant to get out of his car. Although defendant did not testify, and thus did not inform the court that he was in fact ordered out of his car, and although Officer Rix could not remember whether he ordered defendant out of his car or whether defendant exited the automobile of his own accord, it seems

highly unlikely to us that, under the circumstances presented in this case, defendant would have gotten out of his car without being told to do so. The question thus becomes whether this escalation in the intrusiveness of the stop was justified by the traffic violation alone and, if not, whether the additional detention was supported by a reasonable, articulable basis on the part of the police for suspecting criminal activity. We are mindful, during our examination of this matter, that "the intrusiveness of the police activity must be carefully limited to the circumstances justifying the detention." Burrell, supra, 457.

With respect to the Fourth Amendment of the United States Constitution, the reasonableness of requesting a driver to get out of a vehicle following a lawful traffic stop has been answered by the United States Supreme Court in Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977). In Mimms, a majority of the Supreme court held that a police officer's order to a driver to exit his car after the car was lawfully stopped for a traffic violation did not violate the Fourth Amendment, even though the officer had no reason to suspect foul play at the time, since the obvious interest in the officer's safety outweighed the de minimus intrusion involved in what was described as "at most a mere inconvenience" to the driver. 98 S Ct 333. The Mimms majority noted that, according to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile and that the hazard of accidental injury from passing traffic to an officer standing on the driver's side of a stopped vehicle may also be appreciable in some situations. Accordingly, under federal law, once a police officer has stopped a vehicle for a traffic violation he has the authority, without more, to order the driver out of the car.

In the dissent in Mimms written by Justice Stevens and in which Justices Brennan and Marshall joined, it is stated that "[t]he Court has based its legal ruling on a factual assumption

about police safety that is dubious at best [and]... has created an entirely new legal standard of justification for intrusions on the liberty of the citizen." 98 S Ct 337. Regarding the majority's reliance on one study's statistical finding that "approximately 30% of all police shootings occurred when the police officer approached a suspect seated in an automobile," 98 S Ct 333, Justice Stevens stated:

"That statement does not fairly characterize the study to which it refers. Moreover, the study does not indicate that police officers can minimize the risk of being shot by ordering drivers stopped for routine traffic violations out of their cars. The study reviewed 110 selected police shootings that occurred in 1959, 1960, and 1961.(7) In 35 of those cases, 'officers were attempting to investigate, control, or pursue suspects who were in automobiles.' (8) Within the group of 35 cases, there were examples of officers who 'were shot through the windshield or car body while their vehicle was moving'; examples in which 'the officer was shot while dismounting from his vehicle or while approaching the suspect[']s vehicle'; and, apparently, instances in which the officer was shot by a passenger in the vehicle. Bristow, [Police Officer Shootings -- A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963)], n. 7, at 93.

"In only 28 of the 35 cases was the location of the suspect who shot the officer verified. In 12 of those cases the suspect was seated behind the wheel of the car, but that figure seems to include cases in which the shooting occurred before the officer had an opportunity to order the suspect to get out. In nine cases the suspect was outside the car talking to the officer when the shooting occurred.

"These figures tell us very little about the risk associated with the routine traffic stop, (9) and they lend no support to the Court's assumption that ordering the routine traffic offender out of his car significantly enhances the officer's safety. Arguably, such an order could actually aggravate the officer's danger because the fear of a search might cause a serious offendor to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed. Whatever the reason, it is significant that some experts in this case of human behavior strongly recommend that the police officer 'never allow the violator to get out of the car. . .' (10)

"7. As the author pointed out, '[n]o attempt was made to obtain a random selection of these cases, as they were extremely hard to collect.' Bristow, Police Officer Shootings--A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963).

"8. Ibid. Since 35 is 32% of 110, presumably this is the basis for the '30%' figure used in the Court's statement. As the text indicates, however, not all of these cases involved police officers approaching a parked vehicle. Whether any of the incidents involved routine traffic offenses, such as driving with an expired license tag, is not indicated in the study.

"9. Over the past 10 years, more than 1,000 police officers have been murdered. FBI, Uniform Crime Reports 289 (1977). Approximately 10% of those killings, or about 11 each year, occurred during 'traffic pursuits and stops,' but it is not clear how many of those pursuits and stops involved offenses such as reckless or high-speed driving, rather than offenses such as driving on an expired license, or how often the shootings could have been avoided by ordering the driver to dismount.

"10. '2. Never allow the violator to get out of the car and stand to its left. If he does get out, which should be avoided, walk him to the rear and right side of the car. Quite obviously this is a much safer area to conduct a conversation.' V. Folley, Police Patrol Techniques and Tactics 95 (1973) (emphasis in original).

"Another authority is even more explicit:

"The officer should stand slightly to the rear of the front door and doorpost. This will prevent the violator from suddenly opening the door and striking the officer. In order to thoroughly protect himself as much as possible, the officer should reach with his weak hand and push the lock button down if the window is open. This will give an indication to the driver that he is to remain inside the vehicle. It will also force the driver to turn his head to talk with the officer.

"The officer should advise the violator why he was stopped and then explain what action the officer intends to take, whether it is a verbal or written warning, or a written citation. If the suspect attempts to exit his vehicle, the officer should push the door closed, lock it, if possible, and tell the driver to 'please stay in the car!' Then he should request [the] identification he desires and request the violator to hand the material out of the window away from the vehicle. The officer should not stare at the identification but [should] return to his vehicle by backing away from the suspect car. As the patrolman backs away, he should keep his eyes on the occupant(s).

"The officer should remain outside of the patrol unit to use the radio or to write a ticket. The recommended position for him at this time would be to the right side of the patrol unit. Should the driver of the violator vehicle make exit from his seat, the officer should direct the violator to the rear center of his vehicle or the front center area of the patrol unit. Preferably, the officer should verbally attempt to get the violator to re-enter and remain in the vehicle." A Yount, Vehicle Stops Manual, Misdemeanor and Felony 2-3 (1976).

"Conflicting advice is found in an earlier work, G. Payton, Patrol Procedure 298 (4th ed. 1971). It is worth noting that these authorities suggest that any danger to the officer from passing traffic may be greatly reduced by the simple and unintrusive expedient of parking the police car behind, and two or three feet to the left of, the offender's vehicle. Folley, supra, at 93; Payton, supra, at 301; Yount, supra at 2." 98 S Ct 337-338.

The dissent by Justice Stevens also notes that a state is free to provide its citizens with greater protection in this matter than that afforded under the Fourth Amendment of the United States Constitution. 98 S Ct 336. It is well established that state constitutions can provide greater protections than those afforded by the federal constitution. People v Thompson, 424 Mich 118, 125; 379 NW2d 49 (1985).

We agree with the dissent of Justice Stevens in Mimms and therefore hold that a police officer, after stopping an automobile for a traffic violation, may not order the driver to exit the car, and thus protract the detention, unless the test announced in Terry has been fulfilled, i.e., unless the officer

had a reasonable, articulable suspicion that the driver committed, or was about to commit, a crime. Maintaining the Terry standard in situations involving traffic stops by police officers will help to ensure that the right to be free from unreasonable seizures will not wholly be eroded in traffic offense cases and, as a corollary, that citizens will not lawfully be vulnerable to unnecessary, intrusive and intimidating police commands. As observed by Justice Stevens, the risk to a police officer in the context of a legitimate traffic stop cannot be so universal as always to constitute a reasonable justification for ordering a citizen out of his car.

> "The commuter on his way home to dinner, the parent driving children to school, the tourist circling the Capitol, or the family on a Sunday afternoon outing hardly pose the same threat as a driver curbed after a high-speed chase through a high-crime area late at night. Nor is it universally true that the driver's interest in remaining in the car is negligible. A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority. Whether viewed from the standpoint of the officer's interest in his own safety, or of the citizen's interest in not being required to obey an arbitrary command, it is perfectly obvious that the millions of traffic stops that occur every year are not fungible." 98 S Ct 338.

In addition, maintaining the Terry standard in this context will help to avoid the arbitrary exercise of the power to force a citizen out of his car in those many, many circumstances in which there exist no suspicions for fearing the driver but, for instance, because of the political message of a bumper sticker on the car or the color of the driver's skin, the driver is nevertheless legally obliged to obey submissively the instruction of a police officer. The line between unfettered discretion and discrimination is a fine one indeed.

We are aware that the majority decision in Mimms has been cited by this Court with apparent approbation. In People v Laube, 154 Mich App 400, 408-410; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987), for example, a panel of this Court, citing Mimms, rejected an argument by the defendant that a stop for the civil infraction of walking on the shoulder of a road with, and

not against, traffic, MCL 257.655, MSA 9.2355, did not authorize the stopping deputies to extend his detention or conduct a frisk. In Laube, however, the defendant himself "consented to, and indeed, appears to have initiated, an extended contact with the officers," and "repeatedly placed his hands in his pockets while inching towards the rear of the patrol car." 154 Mich App 410. These circumstances created a legitimate concern on behalf of the officers regarding their safety. Moreover, in People v Blackburne, 150 Mich App 156, 164-165; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986), a panel of this Court, citing Mimms, found that the detaining, and pat-down searches, of the defendant and three other men were not unreasonable after the driver of the car in which the men were travelling committed a traffic violation by driving on the wrong side of the center line for a distance of about 1/8th of a mile. In Blackburne, however the police had reasonable, articulable suspicions that criminal activity was afoot even before stopping the car for the traffic violation. Before stopping the car and subjecting its driver and passengers to detainment, "[t]he police officers reasonably suspected that the four men in the car were engaged in drug shipment activity." 150 Mich App 164. Thus, while both Laube and Blackburne cite Mimms, neither case, to support its result, relies exclusively on the holding in Mimms.

We find added support in People v Burrell, 417 Mich 439; 339 NW2d 403 (1983), for our conclusion that the Michigan constitutional provision regarding freedom from unreasonable searches and seizures, Const 1963, art 1, §11, affords more protection to individuals such as the present defendant than that provided under federal constitutional law. In Burrell, the defendant's vehicle was legitimately stopped by police for violation of a statute prohibiting excessively noisy exhaust systems, MCL 257.707; MSA 9.2407. This legitimate stop revealed that the driver had no driver's license or vehicle registration. Thus, the police reasonably suspected that the vehicle was stolen. The Supreme Court, stressing that the intrusiveness of

police activity must be carefully limited to the circumstances justifying the detention, found that the police were able to detain the defendants only so long as to write citations for the noisy exhaust system and -- after determining by way of a LEIN check that the driver was licensed and that the car was not reported as stolen -- the driver's failure to have in his possession a valid driver's license. The Court stated:

"Analytically, given this state of facts, it is clear that more than one roadside detention occurred. Initially, driver Brown was properly stopped for an equipment violation. A detention following a stop for such a minor violation would be justified only for the length of time necessary to write a citation. Here, however, the stop immediately revealed a new set of circumstances, a driver without either a operator's license or a vehicle registration. We agree that it was reasonable to suspect that the vehicle was stolen, and we also agree that detention was justified long enough to resolve the suspicion raised. When the LEIN check verified that Brown was licensed and that the car was not reported stolen, that suspicion expired. By 7:15 p.m., detention, again, could be justified only for the length of time required for Blackport to write a citation for Brown's failure to have a valid driver's license in his possession while driving."

Although this statement concerns only the duration of a detention, it is clearly implied that the manner of a detention should be no more intrusive than that necessary to address the issue or issues justifying the detention in the first place. In this regard, the Supreme Court made the following observations and statements:

"In [United States v] Brignoni-Ponce, [422 US 873, 881-882; 95 S Ct 2574; 45 L Ed 2d 607 (1975)], the United Supreme Court applied the Terry 'stop and frisk' doctrine to investigatory stops of automobiles by a roving border patrol. The Court condemned a random stop of a vehicle made because its three passengers appeared to be of Mexican descent. The Court concluded that appearance alone was an insufficient basis to allow a random stop and brief questioning. This result flowed naturally from the Terry requirement that more than 'inchoate and unparticularized suspicion or 'hunch'' was necessary to justify a frisk of a suspicious individual.

* * *

"In Delaware v Prouse, [440 US 648; 99 S Ct 1391; 59 L Ed 2d 660 (1979)], the Court required that a police officer who stops and detains a motorist to check for a valid driver's license and registration have at least an articulable and reasonable suspicion that the motorist is unlicensed or that the vehicle is not registered. The officer in the case testified that he had not observed traffic or equipment violations or any suspicious activity prior to making the stop. The Court ruled that his stop was unreasonable.

"In the instant case, we do not deal with any improper stop. Therefore, neither Brignoni-Ponce nor Delaware v Prouse is dispositive. However, since a stop almost inevitably leads to a brief detention for questioning, we draw guidance from these decisions as to the standard applicable to a brief detention on

an unrelated matter following an otherwise lawful stop. Proceeding from the premise that a brief detention is at least as intrusive for Fourth Amendment purposes as a stop, we conclude that a brief detention for questioning is permissible if based on a reasonable and articulable suspicion of criminal activity.

"Since fourth Amendment rights are involved in a detention, however brief, the intrusiveness of the police activity must be carefully limited to the circumstances justifying the detention." (Footnotes omitted; emphasis in original.) 417 Mich 455-457.

The evidence in the present case is clear that Officer Rix had no reasonable, articulable suspicion that defendant was engaged in criminal activity at the time he, presumably, was ordered out of his car. At that time, Officer Rix knew that defendant's car had frequently gone in and out of a motel parking lot during the early morning hours of May 12, 1986; that numerous stolen cars had been found in the parking lot in the past; that defendant had illegally run a red light in a high-crime area; and that defendant complied in a cooperative manner upon being requested to produce his driver's license and vehicle registration. We fail to see how any "specific reasonable inferences of criminal activity could possibly be drawn from these facts." Burrell, supra, p 458. Either taken singly or in toto, they suggest to us nothing particularly nefarious, illicit, improper or illegal. It is only after defendant got out of his car that questions of safety arose, i.e., it was only after defendant got out of his car that defendant began acting nervously, displayed a bulge in a coat pocket, and produced a gun, for which he possessed a facially valid general permit and safety inspection certificate. This latter evidence, however, was discovered only after the police escalated defendant's detention from that of a mere traffic citation incident to something more. Applicable here is the Burrell Court's observation that, "rather than having a crime and looking for the criminal[], the police, here, had the 'criminal[]' and were looking for the crime." 417 Mich 459. While the results of such police activity may -- and in this case, were -- very efficacious, such ends, in a constitutional matter as that now in issue, cannot justify the means employed. As also noted by the

Supreme Court in Burrell, it is of course painful to suppress otherwise good and highly incriminating evidence that led to a defendant's conviction, but the loss of that evidence "is balanced by the fact that it is only in difficult situations such as those presented here that we can draw the fine lines between the authority of the police to protect us from crime and the use by the police of governmental power to violate our constitutional rights." Id.

Accordingly, having reviewed the entire record in this case, we are firmly convinced that the trial court erred in denying defendant's pretrial motion to suppress the narcotics evidence used against him at trial because we are unable to find specific facts which would support a reasonable suspicion of criminal activity sufficient to justify ordering defendant out of his car after being stopped for a simple traffic violation. Since the incriminating evidence in this case was the fruit of an illegal detention effected by the police, it should have been suppressed. Wong Sun, supra; Shabaz, supra.

In light of our decision to reverse defendant's convictions on the basis of his illegal detention, the other issues he raises on appeal need not be addressed. Burrell, supra, p 460, n 30.

Reversed.

/s/ Myron H. Wahls
/s/ Harold Hood

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 101536

RONALD ALLEN HARMELIN,

Defendant-Appellant.

Before: Wahls, P.J., and Hood and N.J. Kaufman,* JJ.

N.J. KAUFMAN, J. (dissenting)

I vigorously disagree with the majority's hinging review of this case on the assumption that Officers Rix and Blakeney ordered defendant out of his car. The record reflects that neither officer could recall whether defendant was ordered out of his car or whether defendant simply got out on his own initiative, and defendant did not testify.

Unlike the majority, I do not find it in the least unlikely that defendant would have exited his car without being told to do so. To the contrary, given the contraband contained in the trunk of defendant's car, I find it very understandable that defendant would get out and as far away from his car as he could. The majority's assumption concerning defendant's actions is justified by neither the record nor defendant's brief on appeal, the later of which is void of any reference to the theory adopted by the majority.

Clearly, defendant was lawfully stopped for running a red light, a civil infraction, MCL 257.611; MSA 9.2311. People v Burrell, 417 Mich 439, 450; 339 NW2d 403 (1983); People v Laube, 154 Mich App 400, 407; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987). The police officers, in conducting the pat-down search, must have concluded that defendant was armed and dangerous based on a specific, articulable, reasonable inference drawn from the facts for the frisk to have been a reasonable intrusion upon

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

defendant's Fourth Amendment rights. Terry v Ohio, 392 US 1, 32; 88 S Ct 1868; 20 L Ed 2d 889 (1968); Michigan v Summers, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981); People v Blackburne, 150 Mich App 156, 164; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986).

In this case, defendant volunteered the fact that he was carrying a gun, for which he had a general permit, in a holster strapped to his ankle. Seeing what he believed were several bulges in defendant's coat, Officer Rix suspected that defendant was carrying other undisclosed weapons on his person. This suspicion was enhanced by defendant's extremely nervous demeanor and their location in a high crime area, and Officer Rix became concerned for his own safety. Although these facts may not justify a pat-down search if considered separately, when considered together the pat-down search was a justifiable intrusion upon defendant's Fourth Amendment rights. The purpose of the pat-down search was not to discover evidence of a crime, but to protect the officers from harm by seizing suspected weapon or weapons. Terry, 392 US 23; Adams v Williams, 407 US 143, 146; 92 S Ct 1921, 1923; 32 L Ed 2d 612, 617 (1972); Pennsylvania v Mimms, 434 US 106, 110; 98 S Ct 330, 333; 54 L Ed 2d 331, 336-337 (1977); and Ybarra v Illinois, 444 US 85, 93; 100 S Ct 338, 343; 62 L Ed 2d 238, 247 (1979).

There is no need to strain for reversal by following the dissent in Mimms, as the majority in this case has done, because the Terry test was met: the officers had a reasonable, articulable suspicion that defendant was armed and a danger to their safety.

Nor do any of defendant's four other claims on appeal require reversal.

First, defendant argues that his right not to be compelled to testify against himself was violated when Officer Rix asked him about the hard object felt in defendant's chest

pocket. This conversation took place prior to defendant's arrest. Officer Rix believed the hard object was another gun, and asked defendant what it was. Defendant replied that it was his marijuana. The limited constraint conferred upon defendant's freedom by the officers conducting the pat-down search does not rise to the level of a custodial interrogation, and precludes a finding that defendant's admission was compelled by police action. People v Hill, 429 Mich 382, 397; 415 NW2d 193 (1987).

Second, the warrantless search of defendant's car was not an unjustifiable intrusion upon defendant's Fourth Amendment rights such that the fruits of this search should have been suppressed. Defendant's car was properly impounded under the forfeiture provisions on the Controlled Substance Act, MCL 333.7522; MSA 14.15(7522). However, because the officers' testimony established that the Oak Park Police Department's standardized procedure did not mandate searching and conducting an inventory of the contents of every container within the vehicle, the inventory search done in this case does not fall within the parameters of Colorado v Bertine, 479 US ___; 107 S Ct 738; 93 L Ed 2d 739 (1987); People v Krezen, 427 Mich 681; 397 NW2d 803 (1986).

I would find that the search in this case falls under the automobile exception to the warrant requirement enunciated in United States v Ross, 456 US 789; 102 S Ct 2157; 72 L Ed 2d 572 (1982), and adopted by this Court in People v Cruz, 161 Mich App 238, 241-242; 409 NW2d 797 (1987), lv den 430 Mich 854 (1988). Ten clear plastic bags filled with white powder, three small vials containing white powder, assorted pills and capsules, paraphernalia of the type used to ingest cocaine, and a telephone paging device were retrieved from defendant's person after his arrest, and a gun was strapped to defendant's ankle when the officers stopped him. These facts would lead a reasonably prudent person, thus police had a probable cause, to believe that

defendant's car contained more controlled substances. People v Goins, 164 Mich App 559, 560; 417 NW2d 499 (1987). Although the trial court's denial of the suppression motion was not based on the automobile exception to the warrant requirement, reversal is not mandated where the trial court reaches the right result for the wrong reasons. People v Beckley, 161 Mich App 120, 131; 409 NW2d 759 (1987), lv gtd on other grds 430 Mich 857 (1988).

Third, under either the Michigan or federal standard,[1] defendant's claims that he was deprived of the effective assistance of counsel and the right to plead not guilty because (1) his trial counsel offered no evidence in response to the prosecutor's case-in-chief, but solely confined the defense to attacking the admissibility of evidence found on defendant's person and in his car, and (2) counsel did not argue that defendant was not guilty of knowingly possessing the cocaine found in his trunk, are both without merit. The evidence against defendant was overwhelming, and counsel's strategy in concentrating the defense on the admissibility of the disputed evidence focused upon defendant's best and only chance of acquittal. This choice of strategy was not the functional equivalent of a guilty plea proscribed in People v Schulz, 85 Mich App 527; 271 NW2d 305 (1978), and defendant was afforded his constitutional right to plead not guilty. People v Fisher, 119 Mich App 445; 326 NW2d 537 (1982).

Defendant's last claim is that the mandatory sentence of life imprisonment is entirely out of proportion to the seriousness of his crime and constitutes a cruel and unusual punishment proscribed by US Const, Am VIII, and Const 1963, art 1, § 16. I disagree. See People v Harding, 163 Mich App 298, 329; 413 NW2d 777 (1987), vacated on other grds 430 Mich 858-859 (1988).

I would affirm defendant's convictions and sentence.

/s/ Nathan J. Kaufman

[1] People v Garcia, 398 Mich 250; 247 NW2d 547 (1976), sets forth the Michigan standard; the federal standard is set forth in Strickland v Washington, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and was applied in People v Dalessandro, 165 Mich App 569, 574-575; 419 NW2d 609 (1988)

Court of Appeals, State of Michigan

ORDER

Myron H. Wahls
Presiding Judge

People v Ronald Allen Harmelin

Docket # 101536

L.C.# CR 86 73784 FH

Harold Hood
Nathan J. Kaufman
Judges

This Court having issued a judgment in this case on January 9, 1989, and precedent, uncited by the parties, affecting the analysis of an issue in that judgment having come to the attention of the Court,

IT IS ORDERED, on the Court's own motion, that the January 9, 1989, judgment is vacated, the decision to publish is reversed, and the case is retained for the issuance of a judgment on reconsideration.

/Harold Hood

A true copy entered and certified by Ronald L. Dzierbicki, Chief Clerk, on

March 9, 1989
Date

Chief Clerk

Court of Appeals, State of Michigan

ORDER

Myron H. Wahls
Presiding Judge

People v Ronald Allen Harmelin

Docket # 101536

L.C.# 86 73784

Harold Hood
Nathan J. Kaufman
Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Norbert G. Juworski, Chief Clerk, on

April 18, 1989
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD ALLEN HARMELIN,

Defendant-Appellant.

April 18, 1989

FOR PUBLICATION

No. 101536

(On Reconsideration)

Before: Wahls, P.J., Hood and N.J. Kaufman*, JJ.

PER CURIAM.

On March 9, 1989, this Court, on its own motion, vacated its judgment in this case issued on January 9, 1989, and retained the matter for reconsideration. Of concern was the effect of a constitutional provision and its case-law precedent, uncited by the parties, on the issue of the propriety of a police officer ordering a driver out of his car after having stopped the driver for a traffic violation. Two judges of this panel concluded that the Michigan Constitution's search-and-seizure provision provided greater protection to drivers in such a situation than that available under the analogous provision of the federal constitution. Under the latter, a police officer's order to a driver to exit his car after the car has been lawfully stopped for a traffic violation does not violate the Fourth Amendment even though the officer had no reason to suspect foul play at the time. Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977). The third judge of this panel, writing in dissent, concluded that the record did not support the assumption that defendant was ordered out of his car by the police and, on the contrary, suggested that defendant had voluntarily gotten out of his car after having been lawfully stopped for a traffic violation.

On reconsideration, we hold that, even if defendant in this case were ordered out of his car by the police after having been legally stopped for a traffic violation, the narcotics evidence revealed after subsequent searches could not have been suppressed from evidence under the Michigan Constitution's search-and-seizure provision because, under the circumstances in this case, that provision affords defendant with no greater protection than that provided under the analogous federal provision in the Fourth Amendment. Regarding the remaining issues raised by defendant on appeal and not addressed in the January 9, 1989, majority opinion, we adopt the reasoning and conclusions set forth in the dissenting opinion of that date.

The facts in this case were recited in our earlier opinion:

> "Defendant, Ronald Allen Harmelin, was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2), and was sentenced on April 30, 1987, by the Oakland Circuit Court to a mandatory life term of imprisonment for the cocaine conviction and a mandatory two-year term of imprisonment for the felony-firearm conviction. On appeal, defendant argues that his convictions must be reversed because the evidence against him was obtained as a result of an unconstitutional seizure and pat-down search of his person and an unconstitutional search of his car; that his convictions must be reversed because he was deprived of the effective assistance of counsel; and that his sentence for the cocaine conviction must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constitutes cruel and unusual punishment....
>
> "The record reveals that in the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. Numerous stolen vehicles had been found in this lot in the past. At this time, the officers observed defendant's car exiting the parking lot, and although they were called away on other police business at various times that morning, they saw defendant's car entering the Embassy Motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of defendant's car, the officers noticed nothing unusual or illegal in the manner in which defendant's car was being driven.
>
> "Shortly after 5:00 a.m., while continuing to patrol the area around the Embassy Motel, Officers Rix and Blakeney saw defendant's car make a U-turn at the intersection of Eight Mile and Hubbell Roads, a high-crime area, without stopping for a red light. When the officers, in their patrol car with its overhead lights flashing, pulled behind defendant's vehicle, defendant responded by stopping in a reasonably prompt fashion. Officer Rix walked to the driver's side of defendant's car, while Officer Blakeney positioned himself at the passenger side of the car. Defendant, who remained seated in his car, complied in a cooperative manner upon being requested by Officer Rix to produce a driver's license and vehicle registration. Defendant then stepped out of his car. Neither of the officers could recall whether defendant was ordered out of his vehicle or whether he got out of it on his own initiative, although Officer Rix testified that if he did in fact order defendant out of the car, that order would have been prompted solely by the nervous behavior exhibited by defendant -- behavior described as defendant's having "trouble getting some of the words out." In any event, after exiting his car, defendant, in a nervous manner, informed Officer Rix that he was carrying a pistol concealed in an ankle holster. He explained that he had a permit for the weapon, however, and that he did not want the officers to become alarmed. He then handed Officer Rix a general permit to carry a concealed weapon as well as a safety inspection certificate for the .38 caliber, five-shot revolver, which was later found in his ankle holster.
>
> "After looking at the firearm documents proffered by defendant, Officer Rix observed nothing which suggested that the papers were possibly invalid. Nonetheless, because defendant appeared to be nervous, because he was armed, albeit legally, and because he had a bulge in one of his coat pockets, Officer Rix, fearing for his own safety and sensing that "[t]here was something wrong," decided to conduct a pat-down search of defendant. In doing so, some marijuana was discovered, and defendant was placed under arrest.
>
> "In searching defendant after his arrest, the officers found other incriminating evidence in defendant's possession, including assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia and a telephone beeper. Later, pursuant to the standard policy of the Oak Park Police Department, defendant's car was impounded for a possible forfeiture action, and an inventory search was conducted. During this search, a satchel containing a shaving-kit bag was discovered in the trunk. The kit contained $2900 in cash and two bags of white powder subsequently determined to be 672.5 grams of cocaine. A fingerprint expert testified that defendant's fingerprints were found on books located inside the satchel and next to the bags of cocaine.
>
> "Defendant neither testified in his own behalf nor presented any witnesses."

In our earlier opinion, we recognized that in Mimms, supra, a majority of the United States Supre Court held that a police officer's order to a driver to get out of his car after the car was lawfully stopped fo traffic violation did not violate the Fourth Amendment, even though the officer had no reason to suspect fo lay at the time, and that other panels of this Court have cited Mimms with approbation, People v Laube, 1

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*Retired Court of Appeals judge, sitting on the Court of Appeals by assignment.

Mich App 400, 408-410; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987); People v Blackburne, 150 Mi App 156, 164-165; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986). Nevertheless, we decided in o earlier opinion that, under the Michigan Constitution's search-and-seizure provision, a driver such defendant in the present case should be afforded more protection from the police than is afforded under t Fourth Amendment's prohibition against unreasonable searches and seizures. In doing so, we followed t dissent of Justice Stevens in Mimms, and thus declared that a police officer, after stopping an automobile for traffic violation, could not order the driver to get out of the car, and thus protract the driver's detention, unle the test announced in Terry v Ohio, 391 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), had been fulfilled, i.e unless the officer had a reasonable, articulable suspicion that the driver committed, or was about to commit, crime. We opined that maintaining the Terry standard in situations involving traffic stops by police officer would help to ensure that the right to be free from unreasonable seizures would not be wholly eroded i traffic offense cases and, as a corollary, that citizens would not lawfully be vulnerable to unnecessary intrusive, and intimidating police commands.

On reconsideration, we find that whether Justice Stevens, in his dissent in Mimms, had the bette argument on this issue is not controlling because in this case we are obliged to follow the majority decision ir Mimms. The search-and-seizure provision in the Michigan Constitution provides:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state." (Emphasis added.) Const 1963, art 1, §11.

The language of this section itself specifies that the protections granted under the section shall not be construed to bar from evidence any narcotic drug seized by a police officer outside the curtilage of a house. In this case, since the evidence was seized from defendant by the police on the open highway, and therefore outside the curtilage of a house, the protections granted under the state's search-and-seizure provision are not available to defendant. Instead, defendant is entitled only to those protections available to him under the federal constitution. See People v Catania, 427 Mich 447, 466, n 12; 398 NW2d 343 (1986); People v Ragland, 149 Mich App 277, 281; 385 NW2d 772 (1986); People v Alfafara, 140 Mich App 551, 560-561; 364 NW2d 743 (1985). And, as already stated, under federal law, the police were entitled to order defendant out of his car after it was lawfully stopped for a traffic violation. Mimms, supra.

After defendant's automobile was lawfully stopped for a traffic violation and after defendant was awfully ordered out of his car, it is clear that a pat-down search of his person was warranted under the Terry standard, i.e., it was reasonable to conclude that criminal activity might have been afoot and that defendant might have been armed and dangerous. See People v Payton, 166 Mich App 428, 430-431; 421 NW2d 191 (1988); People v Peyton, 167 Mich App 230, 236-237; 421 NW2d 643 (1988). Defendant, in a high crime area during early morning hours, was admittedly carrying a pistol in an ankle holster, appeared to be extremely nervous, and had a bulge in one of his coat pockets which led the arresting officer to believe that defendant could have been carrying a second concealed weapon. Fearing for his safety and for that of his partner, and believing that, "[i]f [defendant] had, in fact, guns in his pockets where the bulges were, they could have been used on me, and I wouldn't have had a chance to respond," the officer conducted a pat-down search on defendant.

In the present case, defendant, prior to trial, moved to suppress the narcotics evidence against him on the ground that the detention and pat-down search to which he was subjected violated his Fourth Amendment rights. It is well established that evidence derived from an illegal seizure must be suppressed as the "fruit of the poisonous tree." Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963); People v Shabaz, 424 Mich 42, 65; 378 NW2d 451 (1985), cert dis 478 US 1017; 106 S Ct 3326; 92 L Ed 2d 733 (1986). The trial court denied defendant's pretrial suppression motion. This Court will not disturb trial court's ruling on a suppression motion unless that ruling is clearly erroneous. Payton, supra, p 430; Peyton, supra, p 235; People v Burrell, 417 Mich 439, 448; 339 NW2d 403 (1983). We will find such a ruling

clearly erroneous if firmly convinced that a mistake has been made. People v Daniels, 160 Mich App 61 617; 408 NW2d 398 (1987). We discern no reason to disturb the trial court's ruling in this case.

Regarding the remaining issues raised on appeal by defendant, we agree with the reasoning a conclusions set forth in the dissenting opinion filed with our January 9, 1989, decision. We will review we briefly each of those issues.

First, defendant argues that his right not to be compelled to testify against himself was violated wh Officer Rix asked him about the hard object felt in defendant's chest pocket. This conversation took pla prior to defendant's arrest. Officer Rix believed that the hard object was another gun and asked defend what it was. Defendant replied that it was marijuana. The limited constraint placed upon defendant's freed by the officer conducting the pat-down search does not rise to the level of a custodial interrogation a precludes a finding that defendant's admission was compelled by police action. People v Hill, 429 Mich 3 397; 415 NW2d 193 (1987).

Second, the warrantless search of defendant's car was not an unjustifiable intrusion upon his Fou Amendment rights such that the fruits of this search should have been suppressed. Defendant's car properly impounded under the forfeiture provisions of the Controlled Substances Act, MCL 333.7522; MS 14.15(7522). However, because the officers' testimony in the present case established that the Oak Pa Police Department's standardized procedures did not mandate searching and conducting an inventory of contents of every container within an impounded vehicle such as defendant's, the inventory search done in t case does not fall within the parameters of Colorado v Bertine, 479 US ___; 107 S Ct 738; 93 L Ed 2d 7 (1987); People v Kreczen, 427 Mich 681; 397 NW2d 803 (1986).

Nevertheless, we find that the search in this case falls within the automobile exception to the warra equirement enunciated in United States v Ross, 456 US 789; 102 S Ct 2157; 72 L Ed 2d 572 (1982), a dopted by this Court in People v Cruz, 161 Mich App 238, 241-242; 409 NW2d 797 (1987), lv den 430 Mi 54 (1988). Ten clear plastic bags filled with white powder, three small vials containing white powd assorted pills and capsules, paraphernalia of the type used to facilitate the ingestion of cocaine, and elephone paging device were retrieved from defendant's person after his arrest. Moreover, a gun w trapped to defendant's ankle when he was stopped by the officers. These facts establish probable cause elieve that defendant's car contained more controlled substances. Probable cause exists when the facts a reumstances warrant a person of reasonable prudence to believe that the evidence of a crime or contraba ought is in a stated place. People v Goins, 164 Mich App 559, 560; 417 NW2d 499 (1987). Although t ial court's denial of the suppression motion was not based on the automobile exception to the warra equirement, reversal is not mandated where the trial court reaches the right result for the wrong reas People v Beckley, 161 Mich App 120, 131; 409 NW2d 759 (1987), lv gtd on other grds 430 Mich 857 (1988).

Third, under either the Michigan or federal standard,[1] defendant's claims that he was deprived of t fective assistance of counsel and the right to plead not guilty because (1) his trial counsel offered idence in response to the prosecutor's case-in-chief, but solely confined the defense to attacking t missibility of evidence found on defendant's person and in his car, and (2) counsel did not argue th fendant was not guilty of knowingly possessing the cocaine found in his trunk, are both without merit. T idence against defendant was overwhelming, and counsel's strategy in concentrating the defense on t missibility of the disputed evidence focused upon defendant's best and only chance of acquittal. This choi strategy was not the functional equivalent of a guilty plea, and defendant was afforded his constitution ht to plead not guilty. People v Schulz, 85 Mich App 527; 271 NW2d 305 (1978); People v Fisher, 1 ch App 445; 326 NW2d 537 (1982).

Defendant's last claim is that the mandatory sentence of life imprisonment is entirely out portion to the seriousness of his crime and constitutes a cruel and unusual punishment proscribed by US

Const, Am VIII, and Const 1963, art 1, § 16. We disagree. See People v Harding, 163 Mich App 298, 329; 413 NW2d 777 (1987), vacated on other grounds 430 Mich 859 (1988).

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Nathan J. Kaufman

[1] People v Garcia, 398 Mich 250; 247 NW2d 547 (1976), sets forth the long-accepted Michigan standard; the federal standard is set forth in Strickland v Washington, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and was applied in People v Dalessandro, 165 Mich App 569, 574-575; 419 NW2d 609 (1988), to a claim brought under the Michigan Constitution.

Order

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley, Chief Justice
Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices

Entered: January 29, 1990

863744(45)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD HARMELIN,

Defendant-Appellant.

SC: 86374
COA: 101536
LC: 86-73784-FH

On order of the Court, the delayed application for leave to appeal and the motion for remand are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

30123

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 29, 1990 Corbin R. Davis
Clerk

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-v-

RONALD HARMELIN,
Defendant.

Case No. 101536
L.C. No. 86-73784-FH

AFFIDAVIT OF RONALD HARMELIN

Ronald Harmelin, being first duly sworn, does say and depose as follows:

1. I was the Defendant in the above captioned case.

2. I was in custody the entire time since my arrest.

3. My attorney, Curtis Rundell, never visited me at the jail. He did accept a couple of calls from me, but I could not talk freely because of the lack of privacy. Mr. Rundell refused my repeated requests that he visit me at the jail to discuss the case.

4. At no time did I ever tell attorney Rundell that I was guilty of the crime charged.

Ronald Harmelin
RONALD HARMELIN

Subscribed and sworn to before me this date: 1-5-88

LINDA C. NELSON
Notary Public, Wayne County, MI
My Commission Expires Jan. 22, 1991

Linda C. Nelson
Notary Public, Wayne County, Michigan

My commission expires 1-22-91

DETROIT FREE PRESS/SATURDAY, APRIL 29, 1989 5A

STATE

Judge rejects life sentence in drug case

BY JOE SWICKARD
Free Press Staff Writer

A Detroit Recorder's Court judge, in a ruling Friday, found the state's mandatory sentence of life in prison without parole in major drug possession cases to be unconstitutional because it is cruel and unusual punishment.

Judge Vera Massey Jones said it was improper to equate the drug offense with first-degree murder, one of the few offenses to carry the state's most severe sentence.

The penalty question arose in the case of Dwight Rashad, convicted April 20 of possession of 19 pounds of cocaine. Jones said she would sentence Rashad on May 5.

Assistant Prosecutor James Metz said Jones' ruling will be appealed and predicted the life sentence would be upheld.

"It is necessary to combat this cancer that is spreading through every community," Metz said, referring to drug abuse.

But defense lawyer Milton Henry said the state's drug laws are unrealistic and that he welcomes the prosecutor's appeal.

"The law speaks about possession of more than 650 grams of a powder containing cocaine — it doesn't even set a standard for what percentage of the powder is the drug," Henry said. "No matter how you balance it, it's cruel and unusual punishment.

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